IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 47 of 1989

HIRA LAL
V/S
BAHADUR MAL

Mr. SL JAIN, for the appellant / petitioner

None present for the respondent

Date of Order : 4.12.2006

HON'BLE SHRI N P GUPTA,J.

JUDGMENT

The present appeal has been filed by the defendant against the judgments and decrees of the two learned courts below, decreeing the plaintiff's suit for perpetual injunction, restraining the defendant from obstructing the plaintiff's raising further construction, resulting into closure of the disputed window, ventilator, and Chhajja, and also directing to remove constructed portion of Piao (water hut) to the extent specified therein.

The facts of the case are, that the plaintiff filed the present suit, alleging interalia that he had purchased the land mentioned in para-1 of the plaint, on 9.11.1962 from one Mohan Nath by registered sale deed. It was then alleged that since the land purchased by the plaintiff was of lower level, it was agreed that whenever

the plaintiff raises construction, at that time the seller would close the window and ventilator, or it will be open to the plaintiff to close them by constructing a wall. It was alleged that later on Mohan Nath sold a portion of the rear property to the defendant, and at that time he was told about the stipulation, and the purchaser had also met the plaintiff, and it was agreed that the defendant will abide by the stipulation. However, sometimes before filing of the suit, the plaintiff constructed shops, and then on 1.10.1983 the plaintiff started raising construction on the upper storey of the shops, which was to result into closure of the window, at that time the daughter and son in law of the defendant raised a dispute, and therefore, the work had to be suspended. It was then alleged that the plaintiff had some more land in the north, but then at the behest of the defendant, his relations constructed a room towards north of the shop, on 2.10.83 overnight, and has started using that room as water hut, which they have no right to construct. Interalia with these averments the mandatory injunction was prayed, for removal of the construction in the north of the plaintiff's plot, and for perpetual injunction, restraining the defendant from interfering with the plaintiff's closing window, and ventilator.

The defendant contested the suit by filing written statement. The purchase of the Bara by the plaintiff from Mohan Nath was not admitted. Likewise Mohan Nath's agreeing

to the stipulation was also denied. Then, various other pleadings of the plaint were also denied, and in additional pleas it was pleaded, that court fee paid is insufficient, and the court has no pecuniary jurisdiction. Then, it was pleaded that the plaintiff has no possession over any land, and it was only on receipt of the summons of the Court that the defendant learnt that the plaintiff has unauthorisedly constructed shops. It was, however, admitted in para-16, that the disputed premises adjoin defendant's premises, and that the ventilator and window did exist, opening on the plaintiff's land since before purchase of the property by the defendant. It was pleaded that at the time of purchase the defendant had no notice of the stipulation contained in the sale deed in favour of the plaintiff, and therefore, there was no question of any talks between the parties. The construction of water hut was denied by pleading, that if some other persons had raised any construction, its liability cannot be fastened on the defendant. Then it was pleaded that the window and ventilator did exist for the last more than 30 years before purchase of the property by the defendant, and the predecessor in interest of the defendant had been receiving light and air, openly peaceably continuously and as of right, and thus a right of easement has perfected in their favour, and is available to the defendant also, and therefore, the plaintiff cannot close the apertures. It was also pleaded, that the sale in favour of plaintiff is forged, without consideration, and

unauthorised, and that the seller had no right to sell the property to the plaintiff, and that the plaintiff never had any possession over it. Interalia with these pleadings it was prayed that the suit be dismissed.

Learned trial court framed as many as 10 issues. However, issue was no. 2 was about the plaintiff's right to close the window, ventilator etc., while issue no. 3 was about assurance given by the defendant to close the window etc. Likewise, issue no. 6 was about the plaintiff's right to remove encroachment made by the defendant. Other issues need not detain me in the moment.

After completing evidence of the parties, the learned trial court, while deciding issue no. 2 found that admittedly both the parties had purchased the property from Mohan Nath itself, and it is also admitted position that towards the east of the plaintiff's property, window, ventilator etc. of the defendant opens on the plaintiff's land. It was considered that in the sale deed Ex.-1, in the portion M to N, it is stipulated that in the east of the property being sold, is the house of the seller, wherein there is one window and one ventilator opening on the land being conveyed, and that whenever the purchaser raises construction the seller would close the window and ventilator, and in view of the provisions of Section 3 of the Transfer of Property Act, the plaintiff is deemed to

have notice of this stipulation which is contained in a registered document. Then, the theory of the plaintiff about oral agreement between the parties was disbelieved, then the stand taken about perfection of easementory right was also negatived, by holding, that while selling the property the seller expressly gave right to the purchaser to close window and ventilator, and thus the issue was decided in favour of the plaintiff. Then, issue no. 3 was decided in the manner, that the findings have already been given while deciding issue no. 2. Then, issues no. 5 and 6 were decided together, and it was found that the plaintiff is entitled to remove the construction of water hut, and that the plaintiff is always free to raise wall on his land in which the defendant cannot obstruct. Interalia with these findings, the suit was decreed as above.

In appeal filed by the present appellant the argument was that Section 40 of the Transfer of Property Act, does not apply, and that the plaintiff cannot close the light and air of the defendant. While on the side of the plaintiff it was argued, that the defendant had purchased the property in the year 1969 only, and in view of the provisions of Section 15 of the Easement Act, unless the easement is continued to be enjoyed for more than 20 years, it is not perfected. Then, application of Section 40 was also pressed into service. Learned lower Appellate Court considered that in the sale deed of the plaintiff,

which is a registered sale deed, the stipulation is contained which is constructive notice, and therefore, the principles of equity and good conscience as invoked are not attracted. Then, Section 40 was also held to be applicable. It was also found that the easement has not perfected his right of easement, as 20 years had not elapsed. Thus, the appeal was dismissed.

The present appeal was admitted on 16.11.1990 by formulating following substantial questions of law:-

> "1. Whether the appellant has got the constructive notice of the condition as mentioned in the sale deed dt. 9.11.62 in favour of the plaintiff?
>
> 2. Whether the appellant has got no right to use the light and air being the easement of necessity from window and ventilator?
>
> 3. Whether the appellant is bound by the condition as enumerated in sale deed dt. 9.11.62 by virtue of Section 40 of the Transfer of Property Act?"

In my view, unless question no.2 is answered in favour of the appellant, the other two questions could not arise. It is only if the appellant is able to show that he has got the right to easement of light and air, then only the question arises as to whether covenant contained in Ex.-1 is binding on the plaintiff or not, by virtue of Section 40, so also the defendant can be said to be having

any notice of the purchase. In that view of the matter, I stand well advised to first concentrate on question no.2.

Question no.2 comprehends the existence of easement of necessity of light and air. Suffice it to say that easement of necessity is described in section 13 of the Easement Act, whereunder if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement, or if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessity implied, be entitled to such easement. Then, the third clause is if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator the transferor or the legal representative of the testator shall be entitled to such easement. Likewise is the condition about easement being apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement. So far the first category of easement is concerned, that

comprehends easement available to the property transferred, which is not the case in hand. Then, the other category, comprehends the cases where easement may be available to the property of the transferor, and in that, the necessary requirement is, that the easement must be necessary for enjoying the transferor's other immovable property or where such an easement is available, apparent and continuous and is necessary for enjoying the share of the latter, then there should not have been expressed any different intention, or different intentions should not be deducible by necessary implication.

Then the easement of necessity is comprehended to arise in the event of alienation of the property inter vivos or testamentary in the manner, that some part of the property is retained, while some part is alienated, and in that event where an easement is necessary for enjoying the property transferred, or the property retained, or where the easement is apparent and continuous, and also necessary as above, then only it can be said to be an easement of necessity. Generally such easements are like right of way or the right of passage of rain water or domestic affluent, or the like, but then, the right of light and air, to my knowledge, does not fall within the category of easement of necessity, and the learned counsel for the appellant has also not shown any legal authority to support the proposition, that right of light and air also falls in the

category of easements, which may be acquired as easement of necessity.

In the present case, neither there is any pleading to the effect that easement of light and air was necessary for enjoying the property of the defendant, nor it is shown that there is absence of expression of any different intention rather a look at the sale deed Ex.1 shows that a different intention is clearly expressed in portion M to N, and thus in my view, it cannot be said that the plaintiff has established to have acquired any right of easement of necessity.

Since the question no.2 as framed comprehends the defendant to have acquired a right of easement of necessity, the question is straightway required to be answered against the appellant.

Even otherwise, though not comprehended by the question, even if I were to examine the question of the appellants to have acquired the right of easement by prescription, as is claimed in the written statement, by claiming that his predecessor in interest had been enjoying for the last 30 years, it would suffice to say, that, a look at the definition of easement as provided under Section 4 shows, that in the very nature of things, easement is a right which the owner or occupier of certain

land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own. Thus, the very nature of easement pre-supposes that the right is claimed over a property which is not of the dominant owner.

In the present case, admittedly the entire property including that of the plaintiff, and the defendant did belong to one common seller Mohan Nath, from whom the plaintiff purchased in the year 1962 and the defendant purchased in the year 1969. Since both the properties belong to one common owner, therefore, obviously the seller could not acquire or claim any easement with respect to his property over his own land. The question of prescriptive easement could possibly have arisen only on the property being sold to the defendant. As so far as the seller is concerned, he has admittedly not claimed easement of light and air. And admittedly as from the date of purchase by the defendant, 20 years had not been completed, much less is there any evidence, that the appellant had been using the right of light and air as the right, as of right, continuously, and to the knowledge of the plaintiff. The obvious result is, that the plaintiff cannot be said to have acquired the right of easement of light and air by prescription either.

Thus, taken from any stand point, the substantial question no. 2 is required to be, and is accordingly answered against the appellant.

The net result is that in view of the answer of question no.2, questions no. 1 and 3 cannot be said to be arising in the present appeal. The appeal thus has no force, and is dismissed. Since nobody has appeared for the respondent, the parties are left to bear their own costs.

(N P GUPTA),J.

/Sushil/